PROSECUTORIAL INDEPENDENCE

POLICY BRIEF

ASSOCIATION OF PROSECUTING ATTORNEYS

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I. Introduction

It is important to recognize the role of prosecutor as an independent "minister of justice."[1] As Chief Prosecutors[2] from across the country, representing diverse jurisdictions, we put forth this policy brief to inform the public and policy makers about our duty to uphold the rule of law and ensure that justice is served in our communities.

At different times in our Nation's history, we have struggled to define what it means to be created equal. Through law and justice, prosecutors have advanced civil rights, the right to vote, victims' rights, and the rights of the accused. Significant work has been done, but even greater work can be accomplished.

Recent efforts by legislators and other state officials to thrust their agendas upon prosecutorial decision-making threatens our independence to pursue justice and safeguard our communities. It is a threat to democratic principles.

In the practice of criminal law, prosecutors are bound by ethical standards that supersede the ordinary duty of a lawyer to advocate zealously on behalf of a client. Instead, our paramount duty is to act in the interest of the public's safety to protect the people of our communities. The American Bar Association's Standards of Criminal Justice state that a "prosecutor's office should exercise sound discretion and independent judgment in the performance of the prosecution function."[3]

It is this Country's adherence to the rule of law that defines us, both throughout our Nation's history and across the world. It is foundational to our Nation's never-ending quest for life, liberty, and the pursuit of happiness. All prosecutors share the common drive to find truth and seek justice.

This policy brief will explore: (1I) the historical perspective, (III) the rule of law, (IV) how the doctrine of separation of powers applies to the office of the prosecutor, (V) the authority of the prosecutor, (VI) the prosecutor's duties and responsibilities, (VII) removal, and (VIII) immunity and encroachment.

[1] American Bar Association, Model Rules of Prof'l Conduct R.3.8: Special Responsibilities of a Prosecutor-Comment [1] (1983).
[2] The term "Chief Prosecutor" or "Prosecutor" is used throughout this statement to denote elected or appointed Prosecutor, District Attorney, State Attorney, Prosecuting Attorney, State's Attorney, Solicitor, Solicitor-General, County Attorney, County Prosecutor, City Attorney, City Prosecutors, District Attorney General, Attorney General, Special Counsel, and U.S. Attorneys.
[3] American Bar Association, Criminal Justice Standards for the Prosecution Function, Standard 3-1.2 (a) Functions and Duties of the Prosecutor, 4th ed. (2017).

II. Historical Perspective

Prosecutors have long been heralded as ministers of justice. In 1935, the United States Supreme Court pronounced in *Berger v. United States* that "[a prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[4]

The United States is the only nation with locally-elected prosecutors.[5] It did not start out that way. The public expectation of prosecutors as qualified professionals took root in the 1820s, as they began to make administrative decisions about prosecution priorities. Thus, voters became concerned that the political parties appointing prosecutors had too much power. A wave of reforms against the patronage system swept the nation as states changed their constitutions to dilute executive power into separately elected positions and allow for elected prosecutors while, at the same time, restricting their ability to simultaneously serve in other government offices or hold other positions that conflict with the exercise of independent prosecutorial discretion.

We recognize that our Nation is governed by laws and not by men or women. It is this Country's adherence to the rule of law, and not in the partisan wills of individuals, which distinguishes us both in history and around the world. It is what defines us. It is foundational to our Nation's relentless quest towards life, liberty, and the pursuit of happiness. All prosecutors are driven to find truth and seek justice without fear or favor.

III. What is the Law?

Law is complex. It is not simply a written rule or statute. Law includes interpretation of that statute to determine if it is constitutional, if it complies with past decisions of courts, and how it might be interpreted by a jury. It includes evaluation of evidence to determine whether it is sufficient to charge or convict a person. Probable cause to believe a crime has been committed is the standard for charging an individual. Proof beyond a reasonable doubt is the standard to convict. Before making charging decisions, prosecutors review all the evidence and then evaluate the strength of legally admissible evidence for trial. They will assess whether there is a reasonable likelihood a Judge or jury will return a guilty verdict. At various stages in the criminal justice process, law enforcement, prosecutors, and ultimately the courts exercise discretion in an effort to equitably and fairly administer the law.

Prosecutors are tasked with using their expertise to determine how to exercise discretion so that they can be fair, can decide how to allocate resources, and can be accountable to the public. Prosecutors neither blindly enforce the law nor passively interpret it. It is incumbent upon prosecutors to protect the rights of all those who interact with the criminal justice system, which means justice can vary from dismissals or diversions to negotiated pleas and trials.

[4] *Berger v. United States*, 295 U.S. 78, 88 (1935).
[5] Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 Yale L.J. 1528, 1549 (2012).

IV. Separation of Powers

The concept of the separation of powers is a fundamental principle in democratic governance, designed to prevent the concentration of authority in a single branch of government. Each branch is designed to guard its own interests and thereby check the power of any other branch. In states that elect local prosecutors, the power is further separated.

The separation of powers is a crucial concept in the context of the office of the prosecutor. While prosecutors possess executive authority to enforce laws, they do not create laws, and their actions and discretion are subject to oversight by the judicial branch and the people. This separation of powers helps maintain the checks and balances essential for a just and functioning legal system in a democratic society, with justice as the ultimate goal.

Prosecutors are not legislators, but play a vital role in the criminal justice system's functioning as laws are passed and adopted by legislators. They work with law enforcement agencies to interpret and apply the laws created by the legislative branch and use their discretion to determine the degree to which certain laws will be applied. And yet, they do not have the authority to create or change laws themselves, maintaining the important separation of legislative and prosecutorial powers. Another aspect of this power is that the charging decisions are also balanced by the people; in some jurisdictions, a grand jury sits as the gatekeeper to the initialization of felony charges.

Most prosecutors are elected officials responsible for the enforcement of criminal laws within their jurisdiction. They lead teams of assistant or deputy prosecutors and collaborate with law enforcement agencies to ensure that laws are enforced. Prosecutors are also invested with the discretion to seek justice in a manner that ensures the fair and equal administration of the law. To meet this goal, prosecutors must balance the protection of the community, the rights of the victim, and the rights and accountability of the defendant. This difficult task includes prosecuting law enforcement and public officials who violate the law.

Finally, the judicial power is where the separation of powers is most evident. The criminal judicial process is adversarial by design. When criminal charges are filed by a prosecutor, it is the role of the judiciary to be a neutral arbiter of disputed facts and interpretations of the law. The judiciary serves as a necessary check upon unfettered prosecutorial power. In this forum, the burden of proof is shouldered by the prosecutor. No person may be convicted of a crime unless the prosecutor proves the case beyond a reasonable doubt to the trier of fact.

V. Authority of the Prosecutor

The issue of prosecutorial authority in the United States is rooted in a complex system that varies based upon jurisdictions. They may be part of the judicial or executive branches of government and may be statutorily or constitutionally authorized. No matter how they are authorized, all are required to take an oath swearing to support or uphold the U.S. Constitution and respective state constitutions, and may include duties specific to the position in that jurisdiction.[6]

Federally, U.S. Attorneys are the Chief prosecutors for the United States in criminal law cases. The offices of Attorney General and U.S. Attorney were created by the Judiciary Act of 1789. U.S. Attorneys are appointed by the President with the advice and

[6] At the state level, there are important differences among jurisdictions as the criminal justice system in each state is "subject to many of the influences that lead state lawmakers to seek their own answers, attuned to the special character of their state, rather than follow a model designed for all states." 1 Lafave, Crim. Proc. § 1.3(c) (4th ed.).

consent of the U.S. Senate. U.S. Attorneys currently exist within the Department of Justice (DOJ),[7] which is part of the executive branch and led by the Attorney General, a President-appointed cabinet position. U.S. Attorneys are invested by statute with the power to prosecute all offenses against the United States within their district.[8] Notably, DOJ policies set by the Attorney General shape how federal prosecutors exercise discretion.[9]

Over 95 percent[10] of the nation's chief prosecutors are locally elected. The most common term of office is a four-year term.[11] Exceptions to elected chief prosecutors include Alaska, Connecticut, Delaware, New Jersey, and Rhode Island. In Alaska and Delaware, local chief prosecutors are appointed by the state Attorney General. In Connecticut, local chief prosecutors are appointed by a state commission. In New Jersey, local chief prosecutors are appointed by the Governor with the advice and consent of the state senate. Finally, in Rhode Island, the state Attorney General, an elected official, is responsible for handling all criminal cases.[12]

The authority for prosecutors is derived from a combination of state constitutional and statutory provisions. For example, Wyoming statutes provide that "Each county attorney shall act in all courts in the state as legal counsel for his county…and prosecute or defend all suits instituted by or against his county…or its officers…[and] perform other duties as prescribed by law."[13] The Idaho Constitution provides, "A prosecuting attorney shall be elected for each organized county in the state…and shall perform such duties as may be prescribed by law," providing the legislature with the authority to prescribe the duties.[14]

VI. Prosecutor's Duties and Responsibilities

Prosecutors do not represent individual clients,[15] but instead represent the people of their jurisdiction. We have a solemn responsibility to each of the individuals involved in the criminal justice system. This responsibility carries with it a directive to ensure that the rule of law is applied equally irrespective of gender, race, nationality, religion, creed, sexual orientation, or socio-economic status. The prosecutor is granted a significant amount of discretion in executing the enforcement of criminal laws, such as the authority to charge or not charge, plea negotiation, or try a case to verdict.[16]

There is little public, political, or legal dispute surrounding a prosecutor's ability to use their discretion in an individual case. While the highest Courts of two separate States have struck down prospective prosecutor policies to not enforce certain criminal laws under the separation of powers, both Courts also noted that it is proper for a prosecutor to exercise their discretion in individual cases.[17]

We have the unique responsibility of carrying the burden of proof within the courtroom to ensure justice, as well as being leaders within our communities outside of the courtroom. Innovations such as alternative prosecution programs, conviction integrity units, victim services units, diversion, restorative justice, and specialized courts are positive outcomes derived from the use of our discretion.

[7] The institutional and functional role of prosecutors: different models and practices, United Nations Office on Drugs and Crime (Feb. 2020), https://www.unodc.org/e4j/zh/crime-prevention-criminal-justice/module-14/key-issues/2--the-institutional-and-functional-role-of-prosecutors_different-models-and-practices.html.

[8] *See*, 28 U.S.C. §547.

[9] *Id.*

[10] Prosecutors in State Courts, 1996, Bureau of Justice Statistics, NCJ 170092 (July 1998), https://bjs.ojp.gov/content/pub/pdf/psc96.pdf; *See also*, Carissa Byrne Hessick, National Study of Prosecutor Elections, University of North Carolina School of Law (Feb. 2020), https://law.unc.edu/wp-content/uploads/2020/01/National-Study-Prosecutor-Elections-2020.pdf (prosecutors are locally elected in forty-five states).

[11] Prosecutors in State Courts, 2005, National Survey of Prosecutors, Bureau of Justice Statistics, NCJ 213799 (July 2006), https://bjs.ojp.gov/library/publications/prosecutors-state-courts-2005

[12] *See*, Carissa Byrne Hessick, National Study of Prosecutor Elections, University of North Carolina School of Law (Feb. 2020), https://law.unc.edu/wp-content/uploads/2020/01/National-Study-Prosecutor-Elections-2020.pdf.

[13] *See*, Wyo. Stat. §18-3-302.

[14] *See*, Id. Const. Art. V, §18.

[15] Some elected prosecutors are also the county's attorney and in that civil capacity do represent the various county agencies. In that civil capacity, they do zealously represent the client's interests.

[16] "The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."
American Bar Association, Criminal Justice Standards for the Prosecution Function, Standard 3-1.2 (b) Functions and Duties of the Prosecutor, 4th ed. (2017).

[17] *See Ayala v. Scott*, 224 So. 3d 755, 759 (Fla. 2017) and *Johnson v. Pataki*, 691 N.E.2d 1002 (N.Y. 1997). It should also be noted that in addition to legal actions, some have attacked prosecutors using quo warranto writs, impeachment or removal proceedings by enacting State Constitutional provisions, and Legislative actions to provide for concurrent jurisdiction over a local prosecutors' cases for other State Attorney Generals.

As is true with all public servants, transparency is necessary for prosecutorial accountability.[18] Prosecutors publicly provide information about office policies and, through the nature of our work, engage in public dialogue. As community leaders, we convene law enforcement agencies, victims and their advocates, business and civic leaders, and community partners in a collaborative effort to enhance public safety.

It is well recognized within the American Bar Association (ABA) Standards of Criminal Justice as prosecutors, "we are not merely… case-processor[s] but also a problem-solver[s] responsible for considering broad goals of the criminal justice system."[19] To support our communities, we invest our offices' resources in public service, education and local activities.[20] However, offices have limited resources and must prioritize cases to conform to the standard that states, "[T]he prosecutor should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers the interests of justice in fairness, accuracy, or the timely disposition of charges, or has a significant potential to lead to the breach of professional obligations. A prosecutor whose workload prevents competent representation should not accept additional matters until the workload is reduced and should work to ensure competent representation in existing matters."[21]

Equally as important is that prosecutors across this Country are bound to ethical standards that supersede zealous advocacy on behalf of any person or entity. Instead, our duty is to protect the people of our communities through sound policies and practices that promote public safety and by ensuring fairness in the process of prosecution. They look to us to ensure, above all else, that justice prevails. In that regard, "[t]his [prosecutorial] responsibility carries with it specific obligations to see that the accused is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons."[22]

VII. Removal

As legendary Manhattan District Attorney Robert Morgenthau would often say, the job of a prosecutor is to investigate and "prosecute cases without fear or favor."[23] No other single actor within the American criminal justice system has the ability and responsibility to impact the lives of victims, witnesses, the accused, and community members more than a prosecutor. Because of this extraordinary responsibility, many states have decided that it is critical that the prosecutor's discretion be checked by their voters. For elected prosecutors, prosecutorial discretion is an extension of the will of the people who elected them to serve.

Prosecutors may be removed from office based upon varied state law grounds. Common grounds for removal from office include incompetency, corruption, a conviction of a felony offense or a misdemeanor offense involving moral turpitude, willful misconduct or delinquency while in office. The method of removal can include recall petition, citizen-driven lawsuit, impeachment, and/or removal by the governor, the legislature or other judicial process. In no state can a prosecutor be removed from office for exercising discretion consistent with their constitutional oaths.

[18] *See* generally Logan Sawyer, Reform Prosecutor and Separation of Powers, 72 OKLA.L. REV 603 (2020).
[19] American Bar Association, Criminal Justice Standards for the Prosecution Function, Standard 3-1.2 (f) Functions and Duties of the Prosecutor, 4th ed. (2017).
[20] *Id.*
[21] American Bar Association, Criminal Justice Standards for the Prosecution Function, Standard 3-1.8 (a) Functions and Duties of the Prosecutor, 4th ed. (2017).
[22] *See*, 5 O.S. Chapter 1, App. 3-A, Rule 3.8 (Comment 1).
[23] https://www.jpost.com/diaspora/robert-morgenthau-legendary-manhattan-da-is-dead-at-99-by-hannah-brown-596441.

Where locally elected prosecutors could not be subjected to a central prosecuting authority, legislators have strengthened the removal provisions for such prosecutors. Most states have long had statutes or constitutional procedures for removing prosecutors from office for misconduct. But some legislators have recently attempted to control the exercise of prosecutorial discretion by expanding removal power to prevent prosecutors from suspending the enforcement of a certain type of crime, from formulating a policy regarding the treatment of certain accused persons or offenses, from publicly announcing such a policy, or from instructing law enforcement regarding the treatment of certain accused persons or offenses.[24] As previously stated, discretionary decisions are baked into the office of a prosecutor, and this necessitates the formulation of many prosecutorial policies. Thus, these most recent attacks on policies also attack the essential nature of what it means to be a prosecutor.

VIII. Immunity and Encroachment

A practical and universally accepted reality is that prosecutor's offices have limited resources and must make discretionary decisions about how to use those resources. Yet resource allocation is not the full extent of a prosecutor's discretion. A prosecutor's discretion is necessary to ensure just outcomes in all cases. Not every complaint is a crime. Not every affront is a constitutional violation. Sometimes justice can and should be meted out in a civil court of law.

It is the prosecutor's exercise of discretion in a meaningful and informed manner that actually prevents an overzealous state action upon its people. Likewise, it is also this same exercise of discretion that may foster action when it is necessary.

Prosecutorial discretion requires protection in order to assure that it is exercised neutrally. The Supreme Court has recognized that a "prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages," and therefore has granted prosecutors absolute immunity from civil liability.[25] Recent legislation has attempted to expose prosecutors to civil liability by waiving and abolishing sovereign and governmental immunity in an effort to influence decision-making in their criminal cases.[26]

In addition to efforts to eliminate prosecutorial immunity, attempts to encroach on prosecutorial authority attack the independence of local prosecutors. Encroachment is the usurping of the prosecutorial authority that disrupts the connection between a decision in a criminal case and the people of the local community it impacts. It eliminates the ability of local prosecutors to formulate a consistent standard for the accused, victims, and the communities we serve.

The public rightfully expects certainty and finality in decisions made by their local elected leaders and representatives. As long as these decision makers engage in an informed and good faith analysis of the issue, the finality of their decision should have the approval of the local community. Superimposing a state-wide prosecutor to second-guess the decisions of local prosecutors interferes with transparency of and accountability for the decisions of the local prosecutor, causing confusion and mistrust within the communities served by local prosecutors.

[24] *See* Tex. H.B. 17, 88th Leg., R.S. (2023).
[25] *Imbler v. Pachtman*, 424 U.S. 409, 424–26 (1976).
[26] *See* Tex. H.B. 1350, 88th Leg., R.S. 378 (2023).

Examples of these efforts have been met with varying success, based in part on the patchwork legal system we have across the United States. In New York, when the Bronx District Attorney refused to prosecute death-penalty cases, the governor simply acted under an existing statute to substitute the attorney general for the prosecutor on death-eligible cases.[27] Other states—such as Illinois and Texas—have specific limits on centralized supersession. Texas' separation of powers clause in the state constitution has been interpreted to prevent the legislature from granting the attorney general concurrent criminal jurisdiction.[28] Florida falls into both camps: its constitution provides that the locally-elected prosecutor "shall be the prosecuting officer of all trial courts in that circuit," but it also has an explicit supersession statute; nevertheless, the judiciary has interpreted this conflict in favor of a broad centralized supersession power, which has allowed successive governors to reassign cases and even completely remove locally-elected prosecutors.[29]

These examples demonstrate the need to preserve historical guardrails against encroachment that have long been in place to ensure the fair and impartial administration of justice. Our nation expects and deserves nothing less.

Conclusion

Chief Prosecutors hold office for a moment in time. It is essential that our historic independence and discretion endure to serve the foundational principles of justice. We serve our communities by using our discretion to make difficult decisions that faithfully honor the law, promote safety, and pursue justice. Protecting prosecutors' discretion protects our democracy.

[27] John A. Horowitz, *Prosecutorial Discretion and the Death Penalty: Creating A Committee to Decide Whether to Seek the Death Penalty,* 65 Fordham L. Rev. 2571, 2583 (1997).
[28] *State v. Stephens,* 663 S.W.3d 45, 47 (Tex. Crim. App. 2021).
[29] *Ayala v. Scott,* 224 So. 3d 755, 759 (Fla. 2017); *Warren v. DeSantis,* No. 4:22CV302-RH-MAF, 2023 WL 345802, at *21 (N.D. Fla. Jan. 20, 2023).